80-1845

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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No. .....

In the

Supreme Court of the United States

OCTOBER TERM, 1980

LENNOX INDUSTRIES, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

1. Whether an employee is entitled, under section 7 of the National Labor Relations Act, 29 U.S.C. § 157, and this Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), to the presence of a union representative at a meeting with his employer at which the employer did not intend to take any disciplinary action and from which no disciplinary action resulted, directly or indirectly.

2. Whether the holding of the NLRB and the Court of Appeals that an employee had the right to the presence of a union representative at a meeting with his employer despite his failure to request such representation, because the employer "should have known" the employee desired representation, is consistent with this Court's holding in *NLRB v. J. Weingarten, supra*, that the right to union representation at employee-employer meetings "arises only in situations where the employee requests representation."

LIST OF PARTIES

1. LENNOX INDUSTRIES, INC. [no parent company, non-wholly-owned subsidiaries, or affiliates]

2. NATIONAL LABOR RELATIONS BOARD

TABLE OF CONTENTS

	Page
Table of authorities	iii
Opinions below	1
Jurisdiction	2
Statutory provision involved	2
Statement of the case	2
Reasons for granting the writ	4
1. The decision of the Court of Appeals conflicts with decisions of two other Courts of Appeal and with this Court's *Weingarten* decision regarding the likelihood of discipline that must be established before the right to the presence of a union representative exists	4
2. The decision of the Court of Appeals conflicts with this Court's *Weingarten* decision regarding the necessity for an employee to request the presence of a union representative before the right to such a representative exists	8
3. The decision of the Court of Appeals unreasonably extends the right of union representation recognized by this Court's *Weingarten* decision	11
Conclusion	12
Appendix	
1. Opinion of Court of Appeals for the Fifth Circuit	A-1
2. Opinion of the National Labor Relations Board	A-11
3. Judgments of the Court of Appeals for the Fifth Circuit	A-51
4. Order on Petitions for Rehearing and for Rehearing En Banc	A-53

TABLE OF AUTHORITIES

Cases — Page

AAA Equipment Service Company v. NLRB
598 F.2d 1142 (8th Cir. 1979) 5,6,7,8

Anchortank, Inc. v. NLRB
618 F.2d 1153 (5th Cir. 1980) 5,7,8

Baton Rouge Water Works Co.
246 NLRB No. 161 (Dec. 14, 1979) 5

Alfred M. Lewis, Inc. v. NLRB
587 F.2d 403 (9th Cir. 1978) 6,7,8

Miranda v. Arizona
384 U.S. 436 (1966) 10

NLRB v. J. Weingarten, Inc.
420 U.S. 251 (1975) ..... throughout

Roadway Express, Inc.
246 NLRB No. 180 (Dec. 18, 1979) 9n.2

Spartan Stores, Inc. v. NLRB
628 F.2d 953 (6th Cir. 1980) 6n.1

United States Postal Service
252 NLRB No. 14 (Sept. 9, 1980) 5

United Telephone Co. of Florida
251 NLRB No. 101 (Aug. 25, 1980) 5

Statutes and Rules

28 U.S.C. § 1254(1) 2

29 U.S.C. § 157 2

29 U.S.C. § 160(e) 2,4

Supreme Court Rule 17.1 8

Periodicals

Bartosic, *The Supreme Court, 1974 Term: The Allocation of Power in Deciding Labor Policy*, 62 VA. L. REV. 533, 576 (1976) 10

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 637 F.2d 340. The opinion of the NLRB is reported at 244 NLRB No. 88 (August 24, 1979), 1979-80 CCH Labor Cases ¶ 16,202 (August 24, 1979).

JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1981. Timely petitions for rehearing and for rehearing *en banc* were denied on March 19, 1981, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and 29 U.S.C. § 160(e).

STATUTORY PROVISION INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

STATEMENT OF THE CASE

Lennox is a corporation engaged in the business of manufacturing heaters and air conditioners. (R.Vol. II, p.238). It operates a plant in Fort Worth, Texas, where it employs approximately 250 employees in its final assembly operation. (*Id.*, pp. 238-39). In 1978, Fred Boenker was the manager of final assembly, and Leo Ary was one of the nine supervisors who reported to him. (*Id.*, p. 239). Paul Nestle began working in assembly line positions at the Lennox plant in 1969. He is a member of the union and has served as a union committeeman. (*Id.*). In early January, 1979, Nestle was transferred to "Line 4," along with others, and

experienced for the next six weeks considerable difficulty in achieving a satisfactory level of production. (*Id.*, p. 240). Ary supervised Line 4. (*Id*). At some point during Nestle's first six weeks on Line 4, Ary told Nestle that his production "just wasn't going to get it," and that if Nestle did not improve, "some action" might have to be taken. (*Id.*).

In the afternoon of February 16, 1978, Ary approached Nestle and stated that he would like to have a talk with him at Ary's desk. *Nowhere in the record is there any evidence concerning the reason for Ary's request.* Nestle replied that he wanted a committeeman present; Ary responded that he did not need one. Words were exchanged between Ary and Nestle *on the way* to Ary's desk; and before they reached the desk, Ary suggested, and Nestle agreed, that they should go to Boenker's office. Ary made the suggestion because he perceived that Nestle had threatened him with physical harm. The originally intended meeting at Ary's desk was thus never held.

When Ary and Nestle arrived in Boenker's office, Ary immediately complained of *the alleged threatening remarks made by Nestle on the way to Ary's desk.* Nestle did not request a committeeman at this point (R.Vol. II, p. 245 n.12), but instead, in response to a question from Boenker, denied that he had threatened Ary. Confirming Ary's answer to another question by Boenker, Nestle also stated that there were no witnesses to the alleged threat. Boenker then *changed the subject* by alluding to production, and asked Nestle and Ary to wait while he took a telephone call. During the call, Ary and Nestle began airing their dislike of one another, only to be interrupted by Boenker when he got off the telephone. After admonishing Ary and Nestle to try to get along, Boenker returned to the topic of productivity. He stated he believed Nestle and employee

Wade were causing a slowdown in production. Nestle began to explain his slow work, *then* asked for a committeeman. Boenker replied that if he thought Nestle needed a committeeman, he would get one. Boenker shortly concluded the meeting by further encouraging Ary and Nestle to get along, reminding Nestle to improve his production, and assuring Nestle that he was not being threatened. (R.Vol. II, pp. 240, 244-45, 274-77). *Neither Ary nor Boenker at any point during this episode intended disciplinary action against Nestle, and Nestle received no discipline, directly or indirectly, as a result of the meeting.* (R.Vol. II, p. 246).

The Board charged Lennox with twice violating Nestle's section 7 rights to the presence of a union representative as a result of the occurrences just described. An Administrative Law Judge found that the violations had occurred and entered the customary cease and desist order. Lennox excepted to the Administrative Law Judge's decision, but the Board sustained it. Pursuant to 29 U.S.C. § 160, Lennox petitioned the Court of Appeals for the Fifth Circuit for review of the NLRB's decision. The Court of Appeals denied the petition and ordered enforcement.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF TWO OTHER COURTS OF APPEAL AND WITH THIS COURT'S *WEINGARTEN* DECISION REGARDING THE LIKELIHOOD OF DISCIPLINE THAT MUST BE ESTABLISHED BEFORE THE RIGHT TO THE PRESENCE OF A UNION REPRESENTATIVE EXISTS.

In *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), this Court endorsed the holding of the NLRB that section 7 of the National Labor Relations Act guarantees an employee

the right to union representation at an investigatory interview that the employee reasonably fears may result in discipline. The most frequently litigated issue since the decision in *Weingarten* has been what interviews are properly categorized as "investigatory." After some hesitation, the NLRB concluded that an interview conducted solely to inform the employee of a predetermined disciplinary decision was not "investigatory" and thus that section 7 does not grant the right to union representation at such an interview. *Baton Rouge Water Works Co.*, 246 N.L.R.B. No. 161 (Dec. 14, 1979). The Fifth Circuit recently endorsed the Board's position, reasoning that no role existed for a union representative during, and that the interests of other unit employees were not affected by, interviews conducted solely to impose discipline. *Anchortank, Inc. v. NLRB*, 618 F.2d 1153, 1168 (5th Cir. 1980).

As the opinion in *Anchortank* correctly noted, the NLRB has construed *Weingarten* to apply generally only to those interviews that involve "factfinding." 618 F.2d 1167 n.26. That does not tell the entire story, however; the fact-finding must also be initiated by the employer for the purpose of supporting or considering *disciplinary* action. For example, the NLRB has held that company-required medical examinations, although clearly involving fact-finding, are too remote from the disciplinary context to invoke section 7 rights. *United States Postal Service*, 252 NLRB No. 14 (Sept. 9, 1980). Similarly, the NLRB, as well as some courts, have held that interviews for the purpose of "training" or "counseling," even if they involve fact-finding, are not of a nature that require the employer to permit union representation. *See, e.g., United Telephone Co. of Florida*, 251 NLRB No. 101 (August 25, 1980); *AAA Equipment Service Company v. NLRB*, 598 F.2d 1142, 1146 (8th Cir.

1979); *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403, 410 (9th Cir. 1978).

In the present case, it is undisputed that Lennox never intended to discipline Nestle and did not *in fact* do so, *directly or indirectly*, as a result of the interview. Nevertheless, because the subjects of the interview were an employee-supervisor "confrontation" and the employee's work performance, the Court of Appeals held: (i) that the interview was "inherently" disciplinary and (ii) that the employer's lack of intent to discipline, as well as the fact that no form of discipline resulted from the interview, were legally irrelevant. 637 F.2d at 344; App. at A-6/A-7. In doing so, the Court of Appeals explicitly rejected the following reasoning of two sister Courts of Appeal:

> It should be acknowledged that a supervisory interview in which the employee *is questioned* or instructed *about work performance* inevitably carries with it the threat that if the employee cannot or will not comply with a directive, discharge or discipline may follow; but that latent threat, without more, does not invoke the right to the assistance of a union representative. The right of representation arises *when a significant purpose of the interview is to obtain facts to support disciplinary action that is probable or that is being seriously considered.*

Alfred M. Lewis, Inc. v. NLRB, supra, 587 F.2d at 410 (emphasis added). *Accord, AAA Equipment Service Company v. NLRB*, 598 F.2d 1142, 1146 (8th Cir. 1979). *See* 637 F.2d at 344; App. at A-6/A-7.[1] According to the Court of

[1]Although analyzed in terms of the reasonableness of the employee's fear of discipline rather than in terms of the nature or purpose of the meeting itself, the Sixth Circuit's decision in *Spartan Stores, Inc. v. NLRB*, 628 F.2d 953 (6th Cir. 1980), clearly follows the *Lewis — AAA* rationale. See 628 F.2d at 958. Thus, there are in fact now three Courts of Appeal aligned against the view taken by the Court of Appeals here.

Appeals the above reasoning is "plainly inconsistent with the dictates and rationale of the Supreme Court in *Weingarten*." 637 F.2d at 344; App. at A-7. Lennox respectfully, but most strongly, disagrees.

This Court in *Weingarten* approved the NLRB's construction of section 7 because it found that the Board had struck an appropriate balance between employee rights and "legitimate employer prerogatives." One of the "prerogatives" that the NLRB explicitly recognized was the right of the employer to give "instructions or training or needed corrections of work techniques." 420 U.S. at 258. The *Lewis* and *AAA* courts acknowledge that such discussions carry the "latent threat" of discipline, but they also acknowledge, as the Court of Appeals here did not, that to extend the right of representation to such interviews strikes at the essence of the managerial function. Very few "work-related" employer-employee discussions concern anything but "work performance." If the "latent threat" of discipline in those discussions is enough to make them "inherently" disciplinary, the balance between employee and employer rights struck by the NLRB and approved in *Weingarten* is overturned, and the right to representation becomes virtually absolute.

According to the Court of Appeals, representation is not required at interviews where the imposition of discipline is a "foregone conclusion," 637 F.2d at 343 n.7; App. at A-5 n.7, because there is no role for a union representative to play at such an interview and there is no likely impact on the bargaining unit as a whole. *Anchortank, Inc. v. NLRB*, *supra*, at 1168. In the present case it was the *non*-imposition of discipline that was the "foregone conclusion," rather than the imposition of discipline, but no reason was offered by the Court of Appeals and Lennox suggests that none

exists, why the result should be different. All of the purely hypothetical "adverse effects" postulated by the lower court when the employer's intent is *not* to impose discipline, 637 F.2d at 344; App. at A-7, are equally likely (or unlikely) to occur when the employer's intent is solely to impose predetermined discipline. For that matter, there is no reason whatever why a meeting for the purpose of "instructions or training or needed corrections of work technique" could not be used "to decide whether discipline against an employee is an option to be seriously considered," 637 F.2d at 344; App. at A-7, or "result in discipline if the employee surprises his employer with an answer which the employer finds unsatisfactory or threatening." *Id.* The critical point is that, for purposes of administrative and judicial analysis, the focus must always be on what actually happened at the meeting and not on what might have happened. *See Anchortank v. NLRB*, *supra*, at 1168 ("To determine whether there was a right to representation at Kittley's interview, we must know what transpired there...").

For the reasons just noted, the decision of the Court of Appeals here conflicts with the *Lewis* and *AAA* opinions as well as with this Court's *Weingarten* decision. Those conflicts justify granting certiorari. Sup. Ct. R. 17.1(a).

2. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S *WEINGARTEN* DECISION REGARDING THE NECESSITY FOR AN EMPLOYEE TO REQUEST THE PRESENCE OF A UNION REPRESENTATIVE BEFORE THE RIGHT TO SUCH A REPRESENTATIVE EXISTS.

One of the prudential limitations — imposed by the NLRB and ratified by this Court — on the employee's

section 7 right of union representation at investigatory meetings with his employer is that

> the right arises only in situations where the employee requests representation. In other words, the employee may forgo his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative.

420 U.S. at 257. In the present case, Nestle made a request for representation on the shop floor when he was asked to meet with his supervisor, Ary, at Ary's desk, but because of the intervening "confrontation" the meeting at the desk was never held; instead, Ary took Nestle to the office of Ary's superior, Boenker, to complain about Nestle's threatening remark. Nestle did not ask for representation when a question was put to him about the "confrontation," and thus no right of representation arose.

The Court of Appeals, however, adopting the NLRB's question-begging characterization of the incident as "a single, interrelated episode," 637 F.2d at 345; App. at A-9, held that Ary, who in the office was acting as the complaining witness rather than as the presiding official,[2] "*should have known*" that if Nestle wanted representation at the aborted meeting at Ary's desk (the subject of which was and is unknown) he also would want representation at the meeting with Boenker, and that Ary's constructive knowledge was sufficient to require that representation be obtained for Nestle even though Ary was not conducting the

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[2]It is undisputed that Boenker did not know that Nestle had requested union representation earlier when Ary had asked Nestle to speak with him at his desk. The NLRB has properly held that "an employee may make a request for union representation while on the plant floor, and need not repeat the request at the office *if the official there is aware of the request....*" *Roadway Express, Inc.*, 246 N.L.R.B. No. 180 (Dec. 18, 1979).

interview. In short, the Court of Appeals has re-written *Weingarten* to place the burden on the employer, rather than on the employee, to determine whether and when representation is desired. Employers in the Fifth Circuit must now grant representation not only when the employee requests it, but also when the meeting: (i) may by hindsight be judged to be part of a "single, interrelated episode" that was at some point preceded by a request for representation, (ii) relates to a subject matter that in the past has evoked requests for representation from the employee, or (iii) relates to a subject matter that *should* create a fear of discipline by the employee, even if it does not in fact do so. The decision of the Court of Appeals thus apparently constitutes the first step toward incorporating into federal labor law the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966). *Cf.* 637 F.2d at 342; App. at A-1/A-2. *See also Bartosic, The Supreme Court, 1974 Term: The Allocation of Power in Deciding Labor Policy*, 62 VA.L.REV. 533, 576 (1976) (Under *Weingarten* "... the employer has no duty to provide any *Miranda*-like right-to-representation warnings.").

There is no apparent reason why a single meeting or a series of "interrelated" meetings cannot involve imposition of discipline, investigation or factfinding on some other topic, and pure instruction on how to improve work performance. Lennox's position, and the position of this Court in *Weingarten*, requires no more from the employee who is faced with a meeting or a series of meetings concerning different subjects than that he follow this principle: when in doubt, request representation again. If that is "burdensome for the employee," 637 F.2d at 345; App. at A-9, it is a "burden" required by *Weingarten*. The approach of the Court of Appeals, by contrast, would impose upon the employer the truly burdensome and uncertain task of divining

for itself when an employee "should" want representation. Any "tedium" that might result from Lennox's and *Weingarten's* view, 637 F.2d at 345, App. at A-9, is more than compensated for from the employer's standpoint by the concomitant objectivity and predictability of that view.

For the reasons just noted, the decision of the Court of Appeals here conflicts with this Court's decision in *Weingarten*. That conflict justifies granting certiorari. Sup. Ct. R. 17.1(c).

3. THE DECISION OF THE COURT OF APPEALS UNREASONABLY EXTENDS THE RIGHT OF UNION REPRESENTATION RECOGNIZED BY THIS COURT'S *WEINGARTEN* DECISION.

The right of representation recognized in *Weingarten* has the type of immediate, concrete, daily effect on an employer's operation that only a few other rights, labor or otherwise, do. The decision of the Court of Appeals, by both of the holdings challenged in this petition, requires the employer in virtually all conceivable circumstances to take two employees away from work every time that a supervisor wishes to speak with or counsel one employee about production. The resulting damage to productivity from one such incident may not be large, but cumulatively the loss will seriously affect the ability of employers (especially employers of medium-to-small size) in the United States to sell their products at competitive prices.

This Court in *Weingarten* held that the NLRB had permissibly "reconcile[d] conflicting interests of management and labor" in the context of employer-employee meetings. 420 U.S. at 266-67. The decision of the Court of Appeals upsets that careful balancing of interests. The workplace is not the streets, employee-employer meetings are not police interrogations or criminal trials, and the rights recognized

in *Weingarten* are not grounded in the United States Constitution. *Cf.* 637 F.2d at 342 & nn 1,2; App. at A-1/A-2 & nn. 1,2.

The Court of Appeals' unreasonable and unjustifiable extension of the right of representation recognized by this Court in *Weingarten* also justifies the granting of certiorari.

CONCLUSION

For the reasons set forth in this petition, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX

1. Opinion of the Court of Appeals for the Fifth Circuit

LENNOX INDUSTRIES, INC.,
Petitioner, Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent, Cross-Petitioner.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LENNOX INDUSTRIES, INC.,
Respondent.

Nos. 79-3890, 79-3894.

United States Court of Appeals, Fifth Circuit.
Unit A

Feb. 17, 1981.

Petitions for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

BEFORE GOLDBERG, POLITZ AND SAM D. JOHNSON, CIRCUIT JUDGE.

GOLDBERG, Circuit Judge:

Over two centuries ago, James Otis decried a political system which dared to impose taxation without representation. Nearly a decade ago, the Supreme Court played an encore to the blare of Gideon's trumpet[1] and held that there

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[1] *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 790 (1963).

could be no incarceration without representation.[2] About six years ago, the Court applied this concept to the labor relations arena, and ruled that an investigatory confrontation without representation was an unfair labor practice.[3] Today we must determine the parameters of an *investigatory* confrontation in order to decide whether union representation was required at a meeting between an employee and his superior when no discipline was intended by the employer.

Petitioner Lennox Industries, Inc. ("Petitioner" or "Lennox") operates a heater and air conditioner manufacturing plant in Fort Worth, Texas. The United Steelworkers of America, AFL-CIO, Local 4629, represents petitioner's employees. In early 1978, Paul Nestle, a member of the union, was employed at Lennox's Fort Worth plant as an assembly line worker under the supervision of Leo Ary. Fred Boenker, manager of final assembly, was Ary's superior.

Nestle had experienced some difficulty with his assembly line duties and had been criticized by Ary for his slow work. On February, 16, 1798, Ary approached Nestle on the work floor and stated that he would like to talk to Nestle at his (Ary's) desk. Nestle asked that a union representative be present at the meeting, but Ary responded that one would not be necessary. Nestle repeated his request, but nevertheless proceeded toward Ary's desk. As the two men walked, heated words were exchanged and Ary interpreted

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[2] *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

[3] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975).

one of Nestle's remarks as a threat.[4] Ary then asked Nestle to accompany him to Boenker's office and Nestle agreed.

Ary began the meeting with Boenker by complaining that Nestle had threatened him, but Nestle denied this. Boenker asked if there had been any witnesses to the altercation and was told that there were none. Boenker then changed the subject by turning to the issue of production and stating that he had wanted to talk to Nestle and Ary even before their argument. At this point Boenker's telephone rang and as Boenker spoke on the telephone, Nestle and Ary expressed their contempt for each other. Boenker completed his phone call and told Nestle and Ary that while he was aware of their personal differences, he would like to see them get along. Boenker again changed the subject to productivity and discussed the deficiencies of some employees, including Nestle.[5] Nestle attempted to defend himself and asked for a union committeeman to represent him. Boenker replied that if he thought that Nestle needed a committeeman, one would be provided. Boenker then stated that Nestle would have to continue to work under Ary's supervision, and that he did not want any disharmony between supervisors and assembly line workers. He added that Nestle's production would have to improve, but assured Nestle that no threat was intended. The meeting then ended, and both Ary and Nestle left Boenker's office.

In light of the fact that Nestle had requested a union representative and was refused, the National Labor Rela-

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[4] Nestle claimed that he said "Hey, isn't there some way we can work this out?" NLRB Transcript at 27. Boenker testified that Ary recalled Nestle's words as "Let's leave the premises and get things straight between us. NLRB Transcript at 190.

[5] Boenker said that he had been observing Nestle and a co-employee, and that he believed that they were instigating a production slow-down.

tions Board found that Lennox had violated Section 8(a)(1) of the National Labor Relations Act.[6] The Board ordered Lennox to cease and desist from this unfair labor practice and from any practice which would interfere with an employee's exercise of his right of concerted activity, as guaranteed by Section 7 of the Act. Lennox has petitioned this court for review of the Board's decision, and the Board has cross-applied for enforcement of its order.

On appeal, Petitioner Lennox argues that the Board erred in finding a violation of Nestle's right to a union representative at an investigatory meeting. Petitioner notes that the Administrative Law Judge found that discipline was never intended to result from the meeting, and that no discipline in fact resulted. Petitioner reasons that in light of these findings, the meeting was not investigatory, the employee did not reasonably fear discipline, and no union representative was therefore required.

In the landmark case of *NLRB V. J. Weingarten, Inc.*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975), the Supreme Court held that Section 7 of the National Labor Relations Act "guarantees an employee's right to the presence of a union representative at an investigatory interview

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[6] Section 8 of the Act, 29 U.S.C.A. § 158 (West 1973), provides, in pertinent part:

(a) It shall be an unfair labor practice for an employee —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title . . . "Section 157 of this title," Section 7 of the Act, protects concerted activity by employees, including one employee's request for the presence of a union representative at an investigatory interview which the employee reasonably believes might result in discipline. *J. Weingarten, Inc., supra*, 95 S.Ct. at 965—67;

Anchortank, Inc. v. NLRB, 618 F.2d 1153, 1157—58 (5th Cir. 1980). The Board's finding in the case at bar was based upon this doctrine.

in which the risk of discipline reasonably inheres." *Id.* at 965-67. The Court noted that such a rule provides benefits for both employee and employer: it insures adequate representation for an employee who may be too fearful or inarticulate to adequately present his case, and it enables the employer to save time and effort by getting to the bottom of an incident more quickly. Moreover, "[r]equiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality [of employer/employee bargaining power] the Act was designed to eliminate, and bars recourse to the safeguards the Act provided 'to redress the preceived imbalance of economic power between labor and management.'" *Id.* at 966 (citations omitted).

Under *Weingarten*, an employee is entitled to a union representative only when (1) the interview in question is *investigatory*, i. e., when it is designed to elicit answers to work-related questions which might affect the employee or the bargaining unit, and (2) the employee reasonably fears that discipline might result from the interview. Thus where the purpose of a meeting is *disciplinary* rather than *investigatory*, i. e., where the meeting is designed simply to inform an employee of a previously made decision to impose discipline, no union representative is required since there is no attempt to elicit facts which might result in discipline.[7]

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[7] The rationale behind this rule was simply stated by this Court in *Anchortank v. NLRB*, *supra*;

> Since the disciplinary decision has already been made, the union representative cannot safeguard the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. Similarly, because there is no fact-finding at such an interview, the union representative cannot aid the employer and employee by furthering the former's investigation of the incident at issue.

Id. at 1168 (citations omitted); *see Mt. Vernon Tanker Co. v. NLRB*, 549 F.2d 571, 575 (9th Cir. 1977) interview not investigatory, since "[t]he result from the outset is a foregone conclusion").

See NLRB v. Certified Grocers of California, Ltd., 587 F.2d 449 (9th Cir. 1978); Texaco, Inc., 247 N.L.R.B. No. 56 (Jan. 30, 1980); Roadway Express, Inc., 246 N.L.R.B. No. 180) (Dec. 14, 1979); Baton Rouge Water Works Co., 246 N.L.R.B. No. 161 (Dec. 14, 1979). Similarly, where the purpose of a meeting is *supervisory* rather than *investigatory*, e. g., where the meeting is designed simply to show an employee how to improve his work performance, no right to a union representative inheres. *See AAA Equipment Service Co. v. NLRB*, 598 F.2d 1142 (8th Cir. 1979); *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403 (9th Cir. 1978). In the case at bar we must thus decide whether the interview in question was an investigation which Nestle reasonably feared might result in discipline, thereby requiring the presence of a union representative upon request.

Employee Nestle was asked questions concerning both his poor work performance and his less than friendly altercation with his supervisor. Such questioning is investigatory in that is designed to elicit responses which might well result in discipline against the employee. Moreover, even if the employer had previously decided that discipline would definitely not result from the interview in question, information could be elicited at that interview which might enable the employer to build a case against the employee, culminating in discipline at some later date. Hence an interview like the one in the case at bar where the employee is asked questions about poor work or an altercation with a superior is by its very nature "an investigatory interview in which the risk of discipline reasonably inheres." *See J. Weingarten, Inc., supra*, 95 S.Ct. at 966.

Insofar as it is inconsistent with this analysis, we reject the language in Eighth and Ninth Circuit opinions which suggests that it is only when disciplinary action is "proba-

ble" or "seriously considered" that the right of representation arises. *See, e. g., AAA Equipment Service Co., supra,* 598 F.2d at 1146; *Alfred M. Lewis, Inc., supra,* 587 F.2d at 410. Such language is plainly inconsistent with the dictates and rationale of the Supreme Court in *Weingarten.* An interview may well be "investigatory" and may well reasonably include the "risk of discipline" even though the employer is not seriously contemplating discipline at the time the interview is conducted. Indeed, a purpose of the interview may be to decide whether discipline against an employee is an option to be seriously considered. Furthermore, an interview in which work-related questions are asked of an employee, but which the employer does not intend to result in discipline may nevertheless result in discipline if the employee surprises his employer with an answer which the employer finds unsatisfactory or threatening. The *Weingarten* rules [sic] is designed to protect such "fearful" or "inarticulate" employees from the inadvertent results of their answers during work-related interviews. *See, J. Weingarten, Inc., supra,* 95 S.Ct. at 966-67. For the *Weingarten* rationale to be effectively achieved, courts must not narrow the scope of the doctrine as enunciated by the Supreme Court: it is whenever the risk of discipline reasonably inheres in an investigatory interview that a union representative is required, and not merely when disciplinary action is "probable" or "seriously considered." *See id.* at 965-67. *But see AAA Equipment Service Co., supra,* 598 F.2d at 1146; *Alfred M. Lewis, Inc., supra,* 587 F.2d at 410. We break no new ground, but merely restate the words of *Weingarten* in holding that where an interview is designed to elicit information which might reasonably result in discipline—either immediately or at some time in the future—a union representative is required if the employee so requests. Because the risk of discipline is inherent in inter-

views focusing upon poor work or upon an employee/supervisor confrontation, we agree with the Board and find that a union representative was required in the case at bar.[8]

Petitioner also argues that Nestle did not properly request the presence of a union representative at the meetings in question and that therefore no representative was required. Petitioner points out that the purpose of the original meeting between Nestle and Ary was unknown, and that the subsequent meeting in Boenker's office was result of the altercation between Nestle and Ary. Because the second meeting involved a different company official and presumably a different subject, petitioner argues that the employee's request for a representative at the first meeting was not sufficient to require a representative at the second.

It is clear than "an employee may make a request for union representation while on the plant floor, and need not repeat the request at the office if the official there is aware of such request ...." *Roadway Express, Inc., supra.* Petitioner is correct in pointing out that Boenker, the official in whose office the second meeting was held, was unaware of Nestle's original request for a union representative.

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[8] Petitioner's argument that there was not sufficient evidence to support the Board's finding that Nestle reasonably feared discipline as a result of the meetings is without merit. As noted above, it is certainly reasonable for an employee to fear the risk of discipline as a result of a meeting focusing on poor work or on an altercation with his superior. Moreover, assurances that a union representative will be provided if a company official thinks one is necessary are insufficient to allay those reasonable fears. Columbus Foundries, Inc., 229 N.L.R.B. 34 (April 18, 1977), *aff'd*, 84 Lab. Cas. ¶ 10,645 (5th Cir. January 27, 1978); Van Tran Electric Corp., 218 N.L.R.B. 43 (May 29, 1975). The Board's finding that Nestle reasonably feared discipline is supported by substantial evidence on the record as a whole and must therefore be left undisturbed. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 464-65, 95 L.Ed. 456 (1951.)

However, supervisory Ary was present at the second meeting as well as the first, and he was well aware of Nestle's request. Thus Nestle need not have repeated his request in Boenker's office. Moreover, the Administrative Law Judge correctly characterized the two meetings as a "single, interrelated episode," enabling a single request of a union representative to suffice for both meetings. The fact that the scope of the second meeting included the Nestle-Ary confrontation as well as Nestle's poor work is unimportant. Nestle presumably believed that the first meeting would focus on his work performance, and the second meeting dealt with this topic as well. Ary knew that Nestle desired and requested a union representative at the first meeting, and he certainly should have known that a representative was desired at the second. Indeed, once the scope of the second meeting was expanded to include the Nestle-Ary confrontation, there was even more reason for Nestle to want a union representative, since the risk of discipline was increased. It was therefore unnecessary for Nestle to repeat his S.O.S. in distress at the meeting in Boenker's office.

The rationale of *Weingarten* does not require an employee to repeat his request for union representation each time the subject changes during a meeting with company officials. Such a rule would be both burdensome for the employee and tedious for the company officials. As long as one or more company officials are aware of the employee's desire and request for the presence of a union representative, a single request will suffice for the multiple subjects of a single meeting, or for multiple meetings which are part of a "single, interrelated episode," as here. The union representative's admission ticket gained by the employee's original request entitles the employee to representation during both ends of the doubleheader.

The facts of this case fit neatly within the parameters of the rule that in the labor arena there must be no investigatory confrontation without representation. The meetings here were clearly investigatory, and substantial evidence supported the Board's finding that the employee reasonably feared the risk of discipline. Moreover, the employee's request for a union representative was sufficient to require a representative's presence at both meetings, since one company official was present at both meetings and was aware of the request, and since the two meetings were part of a "single, interrelated episode." The Board's order is therefore

ENFORCED.

2. Opinion of the National Labor Relations Board

244 NLRB No. 88

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LENNOX INDUSTRIES, INC.

and **Case 16—CA—7764**

UNITED STEELWORKERS OF AMERICA
AFL—CIO, LOCAL 4629

DECISION AND ORDER

On January 31, 1979, Administrative Law Judge James T. Barker issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith, and to adopt his recommended Order.

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

The basic issue presented herein is whether Respondent violated the *Weingarten* rights[2] of employees Coy Wade and Paul Nestle as a result of exchanges between them and various managers or supervisors of Respondent. While the Administrative Law Judge found that both these employees' *Weingarten* rights have been violated,[3] upon consideration of Respondent's exceptions to the finding of said violations, we find merit to its exception concerning Wade and we shall dismiss the allegations in the complaint with respect thereto.

Coy Wade

1. February 15

As more fully stated in the Administrative Law Judge's Decision, on February 15, 1978, Supervisor Ary approached employee Wade while he was at work and told him that Boenker, one of Respondent's managers, wanted to see him in his office. Consistent with past practice, Wade was not told the purpose of the meeting. Upon being told to go to the office, Wade stated that he wished to have representation. Ary did not refuse the request, but permitted Wade to obtain the assistance of Jerry Apple, the vice president of the Union. Wade and Apple then proceeded to Boenker's office. Upon entering the office, Boenker asked Apple what he could do for him. Apple replied that Wade had requested his assistance there. Boenker, in turn, stated that he did not want to speak with Apple but wished to talk with Wade. When Apple protested that Wade had a right to a

[2] *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).

[3] As the General Counsel has not filed exceptions concerning the Administrative Law Judge's dismissal of additional alleged *Weingarten* violations, we shall adopt the Administrative Law Judge's finding and conclusions on these matters.

counsel, Boenker interjected that he might want to "talk about going fishing, or something."[4] When Apple failed to leave, Boenker placed a phone call to the office of Bill Smith, Respondent's industrial relations manager, but Smith was not in his office. Apple testified that Boenker made a request for Smith to return the call. After the phone call, Boenker requested Apple and Wade to return to work, and they did so.

Later that day, Ary again requested Wade to go to Boenker's office. As before, Wade replied that he wanted representation. Ary did not answer, and Wade immediately met with Lawrence Plemmons, president of the Union, as well as Apple. Upon Apple's suggestion they went directly to Smith's office, where Apple asked Smith "what he was trying to pull" by sending Wade back to Boenker's office "without a committeeman." Smith testified that he had already talked with Boenker about the earlier incident and told Apple that he was familiar with the question as to whether or not Wade should go to Boenker's office for discussion. Smith then told Wade that, if Wade did not go to Boenker's office, he would be in serious trouble. Wade asked Plemmons and Apple what he should do and Apple advised him to go to Boenker's office. Wade left immediately and went to Boenker's office where the two had a short discussion about production problems and general work habits of employees. Boenker asked Wade to take a leadership role in increasing production because he commanded the respect of his fellow employees. The exchange ended and Wade left Boenker's office.

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[4] The Administrative Law Judge discredited Boenker's testimony to the effect that he stated specifically to Wade and Apple that there was no disciplinary action involved in the meeting with Wade.

2. February 16

Shortly before the end of his shift, Wade was standing idle waiting for parts when he was called on the plant's public address system to report to Ary's desk, located on the production floor away from Wade's work station. When Wade reached Ary, he was asked what he was doing standing idle in his work area. A heated verbal exchange ensued in which Wade cursed. When Ary warned Wade against using such language, Wade again cursed, and Ary instructed Wade to go with him to Boenker's office. Wade asked for some representation, but Ary did not respond, possibly because he did not hear the request.

After they arrived at Boenker's office, Ary told Boenker of the prior exchange involving the cursing and Wade agreed with Ary's account. Wade did not reassert his request for representation, and Boenker's remarks to the two basically was a request for them to try to do the best they could to get along, and that there was a need to increase productivity on the assembly line. At that point the shift ended, and Boenker concluded the meeting.

Paul Nestle

During the first 2 weeks in February, Respondent closely watched Nestle's work performance. nestle had recently been transferred to a different assembly line, and was having difficulty increasing his production speed. Nestle was assigned different positions on this line, and Ary noted that the job Nestle was doing just wasn't "going to get it," and that, if Nestle did not acquire greater speed, Ary would have to take some action against him.

In the afternoon of February 16, nestle was approached by Ary, who stated that he would like to talk to him at the

latter's desk. Although Nestle declared that he would like to have a committeeman present, Ary replied that he did not need one. Nevertheless, Nestle indicated that he still desired assistance. Enroute to the desk, Nestle stated something which Ary interpreted as a threat, and Ary took Nestle directly to Boenker's office. There, Ary told Boenker that Nestle had threatened him. When Boenker asked Nestle if this had occurred, Nestle denied it. The matter was discussed further, and it was determined that there were no witnesses to the claimed threat. At this point Boenker was interrupted by a telephone call, and during the call Ary and Nestle aired their personal animosity toward each other. After Boenker was finished with the phone call, he indicated to the two that he was aware of their feelings toward each other but that he would like to see them get along. Boenker further indicated that he had observed Nestle and Wade and that he believed they were causing a slowdown in production. Nestle then requested a committeeman to represent him, and Boenker said that, if he thought Nestle needed one, he would get one. Nestle replied that he would still like a committeeman present. No representative was called, however, and Boenker reminded Nestle that his production would have to improve. After some further discussion, the meeting ended.

Analysis

In *N.L.R.B.* v. *J. Weingarten, Inc.*, *supra*, the Supreme Court held that it is a violation of Section 8(a)(1) for an employer to deny an employee's request that a union representative be present at an interview which the employee reasonably fears might result in disciplinary action. Section 7 of the Act guarantees to employees the right to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Court ma-

jority in *Weingarten* agreed that the action of an employee in seeking to have a union representative present at such an interview "clearly falls within the literal wording of Sec. 7." The employee, said the Court, is clearly seeking the "aid or protection" of a union representative against a perceived threat to the employee's job security. However, for the reasons stated below, we find that Respondent violated Section 8)(a)(1) of the Act only by denying employee Nestle's request for union assistance, but that it did not unlawfully deny any of Wade's requests for assistance.

In view of the prior remarks made to Nestle by Ary that he needed to acquire greater speed and the job he was doing was not "going to make it," it is apparent that Nestle entertained a reasonable fear of discipline when Ary requested that he go with him to Ary's desk. At no time did Ary dispel the apprehension expressed by Nestle in requesting union assistance by advising him that no disciplinary action was being considered.[5] On the contrary, Ary's response was limited to denying this request by telling him that he did not "need" such assistance. Such an equivocal response is not sufficient to allay Nestle's fear of disciplinary action, as Ary did not give any reason why the employee did not "need" assistance. In this circumstance, the comment that an employee does not need assistance is not sufficient basis to disregard an employee's request.[6] However, rather than granting Nestle's request, suspending the interview, or giving him the choice between an interview without assistance or no interview at all,[7] Ary pro-

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[5] *Amoco Chemicals Corporation*, 237 NLRB No. 69 (1978); *General Electric Company*, 240 NLRB No. 66, sl. op., p. 5 (1979).

[6] *Columbus Foundries, Inc.*, 229 NLRB 34, 35 (1977); *Van Tran Electric Corporation*, 218 NLRB 43, 44 (1975.

[7] *Weingarten, supra at* 258.

ceeded to Boenker's office and engaged Nestle in an interview without his requested union representative. Once Ary actually initiated the interview in Boenker's office, the *Weingarten* violation had been established, as the employee who has made a request for union representation on the plant floor need not repeat the request at the interview.

In addition, we agree with the Administrative Law Judge's finding that Respondent also interfered with Nestle's Section 7 rights when it denied Nestle's further request for union assistance made during the course of the interview which followed in Boenker's office. This second request was precipitated by Boenker's accusation that he had observed Nestle and Wade and that he believed they were causing a slowdown in production. While Boenker did not directly deny Nestle's request, his response, similar to that made earlier by Ary, indicated that, if he thought Nestle needed a committeeman, he would get one. However, the evidence shows that Boenker ignored the request, did not send for a representative, and continued with the interview. Accordingly, we adopt the Administrative Law Judge's finding that Respondent violated Section 8(a)(1) by denying Nestle's second request for union assistance at the interview held in Boenker's office.

We disagree, however, with the Administrative Law Judge's finding that Respondent committed similar *Weingarten* violations against employee Wade on February 15 and 16, 1978. With respect to events that preceded the exchange in Smith's office on February 15, the Administrative Law Judge found, and the General Counsel does not now dispute, that Boenker did not act unlawfully in excusing both Wade and Apple from his office after Apple refused to heed Boenker's request that he be able to talk with

Wade alone.[8] When Wade was ordered to report to Boenker's office a second time, instead of doing as ordered, he got the president and the vice president of the Union and went with them to Boenker's superior, Smith. Smith merely warned Wade that, if he did not go to Boenker's office, he would be in serious trouble. Although the Administrative Law Judge viewed Smith's order as a "specific denial of a defined request on Wade's behalf for union representation in the upcoming meeting [with Boenker]," the record does not support such an analysis. The Administrative Law Judge's finding in this regard stretches *Weingarten* to the breaking point. What is crucial is that *Boenker* wanted to meet with Wade; that *only* Boenker knew why he wanted to talk to Wade; and that it was for Wade to request union representation from *Boenker* before any meeting with Boenker. Moreover, it was for Boenker alone to determine whether he wanted to grant Wade's request for union representation at the meeting, not hold the meeting, or give Wade the choice between having an interview without representation or having not interview at all. Smith's advice to Wade that he should report to Boenker's office was merely for the purpose of warning Wade that he could get in serious trouble for disobeying an order to report to a supervisor's office. Although Smith admitted that he had previously talked to Boenker and that he was familiar with the occurrence at Boenker's office earlier that day, this fact is insufficient to show that any renewed demand for union representation by Wade would be rejected by Boenker or that Wade was threatened with discipline should he renew his demand for representation. In view of the above, we also reject the Administrative Law Judge's conclusion that Boenker's discussion with Wade was "tainted by Smith's conduct."

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[8] See *Amoco Oil Company*, 238 NLRB No. 84 (1978).

With respect to the interview the next day, February 16, the record reveals that Ary and Wade got into an argument and Ary suggested that they both go to Boenker's office. Wade requested representation but Ary did not respond to the request. The two proceeded to Boenker's office and met with Boenker to discuss the incident. The Administrative Law Judge specifically found no violation arising out of the meeting in Boenker's office, but he did find a violation with respect to Ary's "denial" of Wade's request for union representation at the time that Ary suggested that the two men proceed to Boenker's office. The record indicated that Ary simply failed to respond to Wade's request for union representation, and not that Ary denied the request for representation. Wade admitted at the hearing that failure to respond could have been caused by Ary having not heard the request to have assistance. No discussions ensued between Wade and Ary prior to their arrival at Boenker's office, and Wade made no further request for a union representative once inside Boenker's office. As the right to have assistance at an interview where discipline is reasonably feared is triggered only upon a request for such representation, we conclude that the record here is insufficient to establish that Respondent was aware that a request for representation had been made prior to the discussion with Wade in Boenker's office on February 16. In so finding we note that no exception has been filed with respect to the Administrative Law Judge's finding that no 8(a)(1) violation occurred during Boenker's efforts to mediate the dispute which had arisen between Ary and Wade.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Lennox Industries, Inc., Fort Worth, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended order.

Dated, Washington, D.C. August 24, 1979

John A. Penello, *Member*

Betty Southard Murphy, *Member*

John C. Truesdale, *Member*

NATIONAL LABOR
RELATIONS BOARD

CHAIRMAN FANNING and MEMBER JENKINS, dissenting in part:

While we agree with the majority's adoption of the Administrative Law Judge's finding that Respondent violated employee Nestle's *Weingarten* rights on the two occasions noted, and also find with them that the evidence is insufficient to show that employee Wade communicated his desire for union assistance to Supervisor Ary on Feburary 16, 1978, we disagree with their conclusion that no *Weingarten* violation occurred in Smith's office the previous day. In his testimony Smith indicated that he was fully aware of Boenker's earlier attempt that day to interview Wade alone despite Wade's forthright request for union assistance. In view of this admission, the cornerstone of the majority's argument, the *only* Boenker knew why he wanted to talk to Wade, is contradicted by record evidence. Consequently, it is apparent that the structure of the majority's argument, which of necessity must be borne by this single cornerstone, is no sounder than its defective cornerstone.

On the morning of February 15, Boenker caused Wade to be sent to his office, for a reason which was not explained to Wade at the time. Wade, apprehensive that the interview might result in disciplinary consequences, contacted Apple, his union vice president, and was accompanied by him to Boenker's office. When Boenker questioned Apple as to the reason for his presence with Wade, Apple said he was there to assist Wade. While Boenker did not give a clear response to this request for assistance, his statement to the two employees that he did not want to speak to Apple and that he might want to talk to Wade about "going fishing, or something" could serve only to increase Wade's fear that the requested interview contained disciplinary overtones. When Boenker's oblique response did not prompt Apple to leave, Boenker attempted to telephone Smith, as Boenker testi-

fied, in order to obtain Smith's advice. Apple testified that after Boenker was informed that Smith was not present, Apple heard Boenker instruct the person who answered the call to have Smith call when he returned. Following the phone call, Boenker chose to defer the requested interview with Wade until later, and ordered both employees back to work.

Later that afternoon, Wade was told, as he had been that morning, to present himself at Boenker's office. Again he sought the assistance of Apple as well as employee Plemmons, president of the Union. Apparently in order to avoid a repetition of the standoff which had occurred in Boenker's office earlier that day, the three went directly to Smith's office. When Apple and Plemmons entered the office, Apple asked Smith "what he was trying to pull" by sending Wade back to Boenker's office "without a committeeman." Smith denied trying to "pull" anything. Smith's account of this exchange states, in part:

> Also, Mr. Apple raised the question as to whether or not Mr. Wade should go to Mr. Boenker's office for discussion. And I advised him I was familiar with that question at that time. I had talked with Mr. Boenker since that morning.

From this quoted testimony, it is clear that Smith had been fully apprised of the events which occurred in Boenker's office that morning. hence, in this context, his threat to Wade that if he did not go to Boenker's office he would be in serious trouble, and his refusal to consider Wade's request for assistance during the interview, which Smith knew Boenker had earlier rejected, placed Smith in a position of full and active responsibility for this denial of Wade's *Weingarten* rights. When Smith threatened Wade with "serious trouble" if he did not go to Boenker's office for the interview, Wade was coerced into going to the interview

with Boenker unassisted.[9] The fact that he did not continue to insist on having his requested union representative present and submitted to the interview does not show, as Respondent argues, that Wade waived his right to union assistance during the interview.[10] In view of the above, the majority's statement that Wade was warned that he could get in serious trouble for disobeying a supervisor's order to go to his office ignores the context in which it was placed, and is blind to the fact that Wade's resistance to going to Boenker's office was not simply that he arbitrarily thought he need not obey the order of a supervisor, but because his further presence alone in that office would be in direct violation of his *Weingarten* rights. For these reasons, we disagree with the majority and would adopt the Administrative Law Judge's finding of an 8(a)(1) violation here.

Dated, Washington, D.C. August 24, 1979

John H. Fanning, *Chairman*

Howard Jenkins, Jr., *Member*

NATIONAL LABOR
RELATIONS BOARD

[9] *New York Telephone Company*, 203 NLRB 1153, 1156 (1973).

[10] See *Super Valu Xenia, a Division of Super Valu Stores, Inc.*, 236 NLRB No. 207, sl. op., pp. 23-24 (1978); *United States Postal Service*, 241 NLRB No. 18, sl. op., p. 3 (1979).

JD-(SF)-17-79
Ft. Worth, Tex.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

LENNOX INDUSTRIES, INC.

and **Case No. 16-CA-7764**

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, LOCAL 4629

EDWARD B. VALVERDE, ESQ., of Ft. Worth, Tex.,
for the General Counsel.

HAROLD E. MUELLER, ESQ., of Ft. Worth, Tex.,
for Respondent.

LAWRENCE PLEMMONS, of Ft. Worth, Tex.,
for the Charging Party.

DECISION

Statement of the Case

JAMES T. BARKER, Administrative Law Judge: This case was heard before me at Ft. Worth, Texas, on August 21, and September 19, 1978, pursuant to a complaint and notice of hearing issued on April 11, 1978, by the Acting Regional Director of the National Labor Relations Board for Region 16.[1] The complaint was timely issued with respect to the

[1] Unless otherwise specified, all dates refer to the year 1978.

February 22 charge filed by United Steelworkers of America, AFL-CIO, Local 4629, hereinafter called the Union. The complaint alleges violations of Section 8(a)(1) of the National Labor Relations Act, as amended, hereinafter called the Act. The parties were provided full opportunity to make opening statements, examine, and cross-examine witnesses, introduce relevant evidence, make closing statements, and file briefs with me. The General Counsel and Respondent timely filed briefs.

Upon the basis of the entire record,[2] my observations of the witnesses and the briefs filed by the General Counsel and Respondent, I make the following:

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[2] The transcript of this proceeding is replete with errors with respect to both the substantive testimony of witnesses and colloquy, statement of position of counsel, and rulings of the Administrative Law Judge. No motion to correct the transcript has been filed, but for the most part clarity and accurate meaning is achieved through context and throughtflow considerations buttressed by the notes of the Administrative Law Judge taken at the hearing. I order no correction.

Documents marked General Counsel's Exhibit 4(a)-(1), 5(a)-(c), and 6(a)-(j), were marked for identification and offered by the General Counsel during the course of the hearing. These documents, which were entitled, Request for Personnel Action or Notice of Verbal Action, were furnished from the files of Respondent pursuant to subpoena. They represented write-ups accomplished by supervision following oral conversations with rank-and-file employees. The credited evidence of record reveals that they were not used as the basis for subsequent disciplinary action but were maintained merely for the purpose of jogging the recollection of the initiating supervisor. The completed forms were not shown to the employee or employees to whom they pertained nor is this type of form normally made available to employees. During the initial day of the proceeding, ruling was reserved on the receipt of the proffered exhibits pending some additional showing on the part of General Counsel as to relevancy, materiality, and foundation. The General Counsel sought and received a ruling placing the exhibits in the rejected exhibit file and did not thereafter seek an amendment of that disposition.

FINDINGS OF FACT

I. The Business of Respondent

At all material times, Respondent has been a corporation organized under the laws of the State of Texas, and has maintained a principal place of business in Ft. Worth, Texas, where it engages in the business of manufacturing heaters and air-conditioners.

During the 12-month period immediately preceding the issuance of the complaint herein, Respondent, in the course and conduct of its business operations, has purchased and received goods and materials at its Ft. Worth, Texas, plant valued in excess of $50,000 directlly from points located outside the State of Texas. Respondent concedes, and I find, that at all times material herein, it has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

Respondent concedes, and I find, that the Union is a labor orgaization within the meaning of Section 2(5) of the Act.

III. The Issues

The General Counsel contends that Respondent violated Section 8(a)(1) of the Act by denying two employees the right on separate occasions to have union representation at interviews in circumstances wherein the employees had reasonable grounds to believe that they would be subjected to disciplinary action. On the other hand, Respondent denies the commission of any unfair labor practice, and, in effect,

avers that, on the basis of the proper resolution of conflicting testimony relating to the several events placed in issue by the complaint, it must be found that the General Counsel failed in its burden to establish the existence of a reasonably grounded belief on the part of the interviewed employees that disciplinary action would result.

B. PERTINENT FACTS

1. Background Facts

Respondent employs approximately 250 employees in its final assembly operation. Fred Boenker is the manager of final assembly, and nine line supervisors, including Leo Ary, report to him. Bill Smith is Respondent's Industrial Relations Manager, and Boenker is surordinate to him in the organizational structure.

The collective-bargaining agreement between the Union and Respondent contains a three-step grievance procedure followed by arbitration. In addition the collective-bargaining agreement provides:

> Any supervisor meeting with an employee for the purpose of issuing written disciplinary action will so advise the employees so that the employee, at his discretion, may invite either his committeeman or the union President or a pre-designated alternate officer to attend. The committeeman or union officer must work the same shift as the employee.

Paul Nestle and Coy Wade have been employed by Respondent in rank-and-file assembly line positions since 1969. Both have been members of the Union at relevant times, and both have served in the capacity of committeeman — a steward-like position with the Union — and Wade was a committeeman at the time the events pertinent herein transpired.

Wade testified that in 1977, while he was serving as a committeeman on the line, he was called into the office of Boenker's predecessor and was told that the production group was not producing at a satisfactory level. He testified further that when an individual emloyee is called to the office, the employee does not know the purpose of the meeting and does not learn of the purpose of the meeting until the meeting is actually convened. Wade did not testify as to the basis of his knowledge, nor did he give specific verification of his generalized testimony to the effect that sometimes employees are called to Boenker's office for encouragement and counseling and sometimes for disciplinary purposes. Similarly, *Nestle* testified that he "generally" went to Boenker's office to receive a reprimand or when some type of problem existed. However, in contradistinction, he further testified that the only time he had been in Boenker's office was on February 16.

In practice, according to the credited testimony of Fred Boenker, first-line supervisors, including Leo Ary, initiate disciplinary actions, which are in writing. The supervisor believing disciplinary action to be warranted consults with higher authority, and this may include Boenker. If a decision to discipline is reached, the line supervisor transmits the written notice of discipline to the employee affected. Boenker testified that he was not "normally" or "usually" involved in either the issurance or dispatch of the written disciplinary notice.

2. The Alleged Unlawful Conduct

a. The Setting

In January and February 1978, both Wade and Nestle were working as assemblers assigned to Line 4 working under the supervision of Leo Ary. Wade had worked on

Line 4 for a period of approximately 3½ years, while Nestle had been transferred to Line 4 in January 1978. Wade had fulfilled job assignments at various stations on Line 4 and found variations in the degree of difficulty in mastering the required job tasks. Some of the work tasks were reorganization of the various assembly lines, Nestle, together with several other employees, was transferred to Line 4, and these transferres and other employees formed a production-line unit comprised of 12 individuals. This assembly line group was having difficulty in February 1978 maintaining production. For his part, in the 6-week period preceding February 15, Nestle was transferred five times and performed four different job tasks on Line 4.[3]

During the week of February 15, Nestle received the impression that he was being watched in the performance of his work by Fred Boenker, and by the plant manager, and to a lesser degree by the factory manager. For a 2-week period prior to February 15, Nestle's work was subjected to close scrutiny by Ary. Ary told Nestle that he was going to try to find a job for Nestle to do because he, Ary, was not satisfied with Nestle's production. Ary told Nestle that he had to increase his production speed. Then, in conjunction with one of the transfers on Line 4, which Nestle experienced, Ary told Nestle that the job Nestle was doing just wasn't "going to get it" and if Nestle did not acquire greater speed, he would have to take some action against him.

During this same period of time, Ary conversed with Wade concerning the failure of the work group to maintain

[3] The record does not reveal whether these assignments required utilization of skills which were foreign to Nestle, but the record establishes that the unit produced on Line 4 was smaller and of a different type than that produced on Line 1 to which Nestle had been assigned immediately prior to January 1978.

production. In substance, Wade blamed some of the difficulty on the poor fabrication of parts which the production group was called upon to assemble. Ary indicated to Wade his awareness of this difficulty but counseled Wade to work with the parts supplied and to endeavor to reach as high a production percentage as possible.[4]

b. Ary speaks with Wade

In mid-morning on Feburary 15, Boenker contacted Ary by telephone and ask Ary to contact Wade at his convenience and send Wade to his office. Boenker said nothing to Ary about the purpose of this meeting with Wade, but it was Boenker's intention to counsel with Wade about his productivity on the assembly line.[5]

Thereafter, Ary approached Wade and told him that Boenker wanted to see him in his office. Wade replied that he wished to have representation. Ary told Wade that he could not have representation, and Wade said, "Now, if I go to court, I'd like to have a lawyer with me." Ary responded, in effect, that Wade could get representation, but Boenker would not let the union representative stay in the meeting. Thereupon, Wade went to the work station of Jerry Apple situated nearby and informed Apple of the substance of his conversation with Ary. Apple, who was employed as an assembler 1 and who was the vice president of the Union went with Wade to Boenker's office. Ary did not accompany them. Wade entered Boenker's office followed by Apple. Wade addressed Boenker stating that he understood Boenker wished to speak with him. Boenker did not re-

[4] The foregoing is based upon the credited and essentially unrefuted testimony of Coy Wade and Paul Nestle.

[5] The foregoing is based upon the credited and undisputed testimony of Fred Boenker.

spond directly but asked Apple what he could do for him. Apple observed that Wade had requested him to serve as his counselor. Boenker stated that he did not want to speak with Apple but wished to talk with Wade. Apple asserted that Wade had a right to counsel. Boenker replied that he might want to talk to Wade about "going fishing, or something." Apple, who had by this time taken a seat in front of Boenker's desk, responded that he had not heard a good fish story for quite some time and would be willing to hear one now. Boenker initiated a phone call and asked to speak to Bill Smith, Respondent's Industrial Relations manager, but Smith was not in. Boenker hung up and told Apple and Wade to return to work.[6]

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[6] The foregoing is based upon a composite of the credited testimony of Fred Boenker, Coy Wade, and Jerry Apple. I credit each witness only to the extent that his testimony is consistent with the foregoing findings. Specifically, I do not credit Wade's testimony on cross-examination to the effect that Boenker told Wade, in terms, that he could not be represented by Apple. Wade's testimony in this respect finds no support in the testimony of either Apple or Boenker, and I find that Boenker made no such overt comment. On the other hand, I do not credit Boenker's testimony to the effect that he stated specifically to Wade and Apple that there was no disciplinary action involved in the meeting with Wade. I conclude from a composite of the testimony in this respect that Boenker was noncommital with respect to the precise purpose of the meeting, and the testimony of Apple and Wade accurately characterized the nature of Boenker's comments. Finally, I do not credit the testimony of Apple on cross-examination that, in seeking to speak with Smith, by telephone, Boenker informed the person to whom he spoke that he had a "man up here unruly," or that in adjourning the meeting, Boenker stated that Bill Smith would probably be calling Apple and Wade "back at a later date." This testimony on cross-examination impressed me as an embellishment of Apple's testimony on direct examination and finds no support in the testimony of either Wade or Boenker.

c. The Events of the Afternoon

(1) The conference with Smith

At approximately 3 p.m., Ary again contacted Wade and told him that Boenker wanted to see him. Wade responded that he wanted representation, but Ary made no comment. Thereupon, Wade went to Line 1 where Apple and Lawrence Plemmons, President of the Union, were conversing. Wade informed Apple and Plemmons that Boenker had sent for him again. Apple suggested that they see Bill Smith concerning the matter. Apple, Plemmons, and Wade proceeded to Smith's office. Before entering, Wade stopped at the restroom, and Plemmons and Apple preceded him into Smith's office. After obtaining permission to speak with Smith, Apple addressed Smith. He asked Smith "what he was trying to pull" by sending Wade back to Boenker's office "without a committeeman." Smith denid trying to "pull" anything, and as Wade entered Smith's office, Smith stated that if Wade did not go to Boenker's office, he would be in serious trouble. Thereupon, Wade asked Plemmons and Apple what he should do, and Apple answered that he had better go to Boenker's office "before [he got] suspended." He added that unfair labor practice charges would be filed later. Wade thereupon left and went directly to Boenker's office.[7]

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[7] The foregoing is based upon a careful consideration of the testimony of Coy Wade, Jerry Apple, and Billy Smith. I reject the testimony of each witness to the extent that it is inconsistent with the foregoing findings. I am convinced, upon my observation of each of the witnesses as they testified before me in the proceeding that, for the most part, they each endeavored consistent with present recollection to convey their preception of the essential meaning of the bits and fragments of dialogue which made up the entire conversation, but they failed to accurately describe many details and each witness recalled pertinent statements differently. I am convinced from my observation of Apple as he testified that he was prone to exaggeration and embellishment and was expansive

After Wade had departed, Apple endeavored to discuss with Smith the legal imparatives resulting from decisions of the Board and Courts which he claimed required the Company to grant Wade's request for representation during the course of any interview with Boenker. A dialogue followed with no resolution of the matter. This later became a topic of conversation between Apple and certain members of Respondent's supervision.[8]

(2) Wade reports to Boenker

In the meantime, Wade met with Boenker in Boenker's office. No one else was present. The meeting was a brief one, and Boenker spoke to Wade about the need for increasing production on the assembly line and, in substance, Boenker urged Wade to take a leadership role in this regard because he commanded the respect of his fellow employees. The conversation also encompassed the work habits of employees generally, the problem of poorly fabricated parts, and the negative impact of this upon production. The conversation was civil, low keyed, and ended with an exchange of pleasantries as the 3:30 p.m. whistle blew ending the workday.[9]

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in certain aspects of his testimony. On the other hand, I conclude from my observation of Smith as he testified that he tended to understate the nature and tenor of events. Specifically, I do not credit Apple's testimony to the effect that Smith said that if Wade did not go to Boenker's office he would be suspended; not do I credit Smith's testimony that he stated in bland terms that Wade should avoid getting himself in a position of being an insubordinate. I am convinced that Smith's directive to Wade was more direct than this and that Wade's testimony accurately describes the directive which Smith gave to him.

[8] The testimony of Jerry Apple and Billy Smith supports the foregoing.

[9] A composite of the credited testimony of Coy Wade and Fred Boenker establishes the foregoing.

d. Ary Reprimands Wade — February 16

Approximately 30 minutes before the end of the shift on the afternoon of February 16, Wade was standing idle waiting for parts. he was summoned over a public address device used for intraplant communication to report to Ary's desk. he did so, and when he approached Ary, Ary asked him what he was doing standing idle in his work area. Wade responded that he was out of parts and was waiting for parts to be brought to him. Ary criticized Wade for standing around, and this led to a heated verbal exchange between them, culminating in Wade's slapping Ary's desk and exclaiming, "God damn!" Ary cautioned Wade against using this type of language in front of him, and Wade responded, "You're such a god damn Christian man." In response, Ary said, "Let's go to Mr. Boenker's office." Wade asked for union representation, but Ary did not respond.[10] They went together to Boenker's office and met with him.

In meeting with Boenker, Ary described the events and the exchange of words which had transpired. Wade indicated his agreement with Ary's summary of the incident, and Boenker took a conciliatory attitude. He spoke concerning the need to increase productivity on the assembly line. As Boenker spoke, the 3:25 p.m. whistle blew, denoting the approach of the end of the workday. Thereupon Boenker told Ary and Wade to go back out in the factory

[10] Wade testified he did not know whether Ary merely ignored his request or did not hear it. There is no evidence concerning the tone of voice used by Wade in requesting union representation, but there is no basis in the record for surmizing that the tonality was less than conversational.

and do the best they could to get along. Boenker noted that it was about time to go home."

e. Ary and Nestle Clash

Just prior to the 2 p.m. break on the afternoon of February 16, Ary approached Nestle at his work station and stated that he would like to talk to Nestle at his desk. Nestle responded that he would like to have a committeeman present. Ary responded that he didn't need one, but Nestle stated that he still desired to have one present. Gerald Walls, an assembler on Line 4, was standing nearby and heard Ary ask Nestle to accompany him to his desk. Nestle asked Wall if he would acknowledge or witness the fact that he had asked Ary for union representation. Thereupon, Nestle proceeded with Ary toward Ary's desk. As they walked, Ary addressed Nestle saying, "You really think you're a smart ass, don't you?" Nestle answered, "Hey, isn't there some way we can get this worked out?" Ary responded saying, "Let's go to Freddie Boenker's office." Nestle stated his willingness to do so. They went together to Boenker's office and spoke with him.

" The foregoing is based upon a composite of the credited testimony of Fred Boenker and Coy Wade. Leo Ary was not called to testify concerning this incident. I do not credit the testimony of Wade to the effect that during the course of this conversation in Boenker's office, Boenker said, "You know, I could send you home for the rest of the day." I am convinced that Boenker made no such statement for the workday was drawing to a close and, indeed the conversation was in progress when the 3:25 p.m. warning whistle blew. It is doubtful that, in this context, Boenker would have made so futile an observation as that attributed to him by Wade. This is particularly so, in my view, because Boenker was well aware of Wade's experience as a union representative fully conversant with his rights, and he was doubtlessly cognizant of the fact that this statement of threatened discipline would have introduced a disciplinary overtone to a meeting at which Boenker endeavored to render conciliatory in nature.

f. Nestle meets with Boenker

Ary commenced the conversation saying, "Freddie, this man just threatened to whip my ass." Boenker replied that he would not permit any show of temper and asked Nestle directly whether he had said that. Nestle denied having made the remark, and Ary again stated that he had. Nestle repeated his denial. Boenker then asked if there had been any witnesses to the conversation between Ary and Nestle, and Ary answered that they had been alone in the aisle, a fact which Nestle substantiated. Thereupon, Boenker alluded to the question of production and stated that he wanted to talk to them anyway. The meeting was interrupted when Boenker answered the telephone on his desk. As Boenker spoke on the telephone, Ary addressed Nestle saying, in substance, that he had tried to have Nestle transferred back to his former position. Ary added that he did not like Nestle and would go so far as to say he hated him. Nestle responded that the feeling was mutual, and at this point, Boenker completed his telephone call and interrupted. Nestle reiterated that he hated Ary, and Boenker stated that he was not running a popularity contest but wanted "production out there." He stated further that he was aware of the personal differences between Ary and Nestle and would like to see them get along. Boenker returned to the topic of productivity in the assembly area and discussed the low production of some employees, including Nestle. Boenker added that he had been observing Nestle and Wade, and he believed they were instigating a slowdown in production. Nestle responded that he was not accustomed to working on units as small as those assembled on Line 4 and wished to be transferred back to his former position. Nestle then asked for a committeeman to represent him, and Boenker replied that if he thought Nestle needed one, he would get one. Boenker added that as long

as a seniority system was in effect, Nestle would work for Leo Ary. Boenker added that he did not want disharmony between supervision and the rank-and-file and stated that as far as the dispute between Ary and Nestle was concerned, he could do nothing about it. He reminded Nestle that his production would have to improve and assured Nestle that he was not threatening him. The meeting ended, and Ary and Nestle left.[12]

CONCLUSIONS

The issue in this proceeding is whether the Section 8(a)(1) of the Act is violated by an employer who summons employees to the loci of supervisory authority and counsels with them while denying their request for union representation during the course of the counseling sessions. The question posed is a derivative of the principle enunciated in

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[12] The foregoing is based upon a careful consideration of the testimony of Paul Nestle and Fred Boenker. I place primary reliance upon the testimony of Nestle. As I observed Boenker testify concerning this particular meeting, I became convinced that he was somewhat evasive and lacked a full and complete recollection of the details which comprised this conversation. I reject his testimony that at no time during the meeting did Nestle seek representation. However, although Nestle's testimony was more reliable than Boenker's in many respects, I am unable to credit the testimony of Nestle to the effect that he lodged a request for a committeeman soon after entering Boenker's office. His testimony in this regard was rationalized, and I am convinced that he mentally merged his earlier request to Ary with a supposed request made in the opening phases of the meeting in Boenker's office. Nor do I credit Nestle that during the course of the conversation in Boenker's office, Boenker stated that he had the option of transferring Nestle to a non-incentive unit or of disciplining him in the event he continued to participate in an alleged slowdown of production. It is clear from the record that the assignment of Nestle was accomplished in accordance with seniority, and Boenker lacked the authority under the agreement to transfer Nestle to a non-incentive group. I am convinced that, in this regard, Nestle further rationalized his testimony to support the essential thrust of his testimonial attributions against Boenker.

N.L.R.B. v. *Wiengarten, Inc.*, 420 U.S. 251 (1975). In *Wiengarten*, the Supreme Court held that in *Quality Manufacturing Company*, 195 NLRB 197, and in *Mobile Oil Corporation*, 196 NLRB 1052, the Board had properly shaped the "contures and limits of the statutory right" vested in employees by Section 7 of the Act to refuse to submit without union representation to interviews which they reasonably fear may result in discipline. In reaching this conclusion, the Supreme Court adopted the rationale of the Board to the effect that the right of an employee to union representation in the described circumstance "inheres in Section 7's guarantee of the right of employees to act in concert for mutual aid and protection." The court further declared that the right arises only in situations where the employee requests representation; that the employee's right to request representation as a condition of participation in an interview is limited to situations "where the employee reasonably believes [meatured by objective standards] the investigation will result in disciplinary action"; that the exercise of the right may not interfere with legitimate employer prerogatives; and that in conducting investigatory interviews the employer is under no duty to bargain with any union representative who may be permitted to attend that interview. The Court also held that an employer has no obligation to justify his refusal to allow union representation, and despite refusal, the employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative.

In *Wiengarten*, the Court noted with approval the following statement of the Board in *Quality Manufacturing Company, supra:*

> We would not apply the rule to such run-of-the-mill shop-floor conversations as, for example, the giving of

> instructions for training or needed corrections of work techniques. In such cases, there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative.

The case at bar involves meetings between rank-and-file employees and supervision at which no disciplinary action was intended and none resulted, directly, or indirectly, from the meetings. However, the meetings were neither prefaced nor punctuated by assurances from supervision that they were to be devoid of disciplinary overtones or content.

In *Amoco Chemical Corporations*, 237 NLRB No. 69, the Board affirmed the action of an administrative Law Judge in dismissing a complaint alleging violations of Section 8(a)(1) of the Act resulting from an employer's denial of separate requests for union representation during the course of excessive absences counseling interviews. These interviews had been conducted by supervision with expressed assurances to each of the interviewes that no disciplinary action would be taken, and none had been forthcoming. The counseling program was found not to constitute an integral part of the employer's disciplinary system.

In contrast, earlier, in *Alfred M. Lewis, Inc.*, 229 NLRB 757, enf. den., in pertinent part, ___ F.2d ___ (C.A. 9), the Board, citing *Wiengarten* and *Quality*, concluded that an employer had violated Section 8(a)(1) of the Act by refusing to permit a union representative to be present at counseling sessions carried out under a production quota and disciplinary system unilaterally instituted by the employer. The new counseling or on-the-job instruction sessions in question had not resulted in the discipline of any of the employees and had the stated and avowed objective of aiding the employees in obtaining adequate production. The

Administrative Law Judge found nothing contrary to the Act in the respondent's refusal to permit a union representative to be present at each of the sessions, and he distinguished *Wiengarten* and *Quality.* In reversing the Administrative Law Judge, the Board stated.

> ... in the present case, the conclusion is inescapable that employees involved in the type of counseling given by Respondent had reasonable grounds to fear adverse consequences. The counseling sessions explored the reasons for an employee's failure to meet the production quotas and took place as an integral part of Respondent's production quota and disciplinary system. the counseling is a preliminary step to the imposition of discipline under the system. Investigatory interviews which may lead to discipline are clearly within the scope of *Wiengarten, supra,* under which the employees' right to representation was affirmed.

As found, in neither *Amoco* nor *Alfred M. Lewis, Inc.*, was disciplinary action taken as a direct consequence of the conferences, and it seems apparent from a careful scrutiny of these precedents that the decision in those cases, in the final analysis, turned on the Board's perception of the state of mind of the interviewee at the time he requested union representation. The avowed purpose or intention of an employer in conducting the interview, and the absence of direct imposition of discipline during the course of the interview, or as an immediate consequence thereof, appears not to have been deemed significant to the ultimate finding made by the Board with respect to the presence or absence of a violation of Section 8(a)(1) of the Act.

I find in agreement with the General Counsel that, under the precepts of these board decisions applying the principals of the *Wiengarten* decision of the Supreme Court to situations analogous to those found in the case at bar, Respondent must be held to have violated Section 8(a)(1) of

the Act in denying certain of the separate requests of employees Wade and Nestle for union representation during the course of interviews with Boenker and/or Ary. The General Counsel correctly contends that, with respect to incidents and occasions detailed below, the employee — Wade or Nestle — being subjected to the interview, had reasonable basis for believing from all surrounding circumstances objectively assessed that the interview would result in disciplinary action. On the other hand, in certain other circumstances, as set forth below, no such reasonable basis existed.

In reaching these conclusions, it is essential to start from the premise that first-line supervision was endowed by management with responsibility for initiating the disciplinary process and for transmitting to the employee the documentation of the decision reached. Thus, it is apparent that employees initimately involved with the daily realities of the workplace comprehended the potential for discipline rising from the involvement of a supervisor, and they knew that the first-line supervisor possessed authority beyond mere jaw boning, but, in point of fact, played an integral role in the disciplinary process. Moreover, in the nature of things, these employees must be credited with a clear insight into the realities of the chain-of-command principal and with the realization of the involvement of upper level supervision, in this case, Fred Boenker, in the formulation of disciplinary decisions. While he neither issued nor transmitted disciplinary notices, he was consulted with respect to many such actions, and, by reason of this position or authority, was believed capable of influencing, if not determining, whether disciplinary action would be taken. It is reasonable here, of course, to attribute a degree of sophistication to Wade and Nestle, for they had served as Union committeemen, and had had experience in fulfilling the functions of this calling

in the first step of the complaint and grievance process provided by the collective-bargaining agreement. It is assumed here that both Wade and Nestle knew that not all corrective or counseling discourse between rank-and-file employees and first-line supervision, or with Boenker, had disciplinary overtones; but they must be presumed to have known also that the potential was present from either or both sources.

The record establishes that the events which transpired in mid-February, and which formed the essential basis for the instant complaint allegations here under scrutiny, occurred against a background of dissatisfaction on the part of supervision with the productivity of both Wade and Nestle, and both had been urged by supervision to improve. Thus, the events of February 15 and 16 did not materialize from thin air, so to speak, but had contextual moorings to what had proceeded in the way of counsel and apparent disapproval on the part of supervision with the contribution of both Wade and Nestle. But, with respect to Wade, it is essential to find as I do, that in February 1978, his assignment to Line 4 had been a longstanding one, and he had received previous indications during the course of at least one meeting in the office of Boenker's predecessor, that, in the eyes of supervision and management, he was viewed as an employee commanding the respect and following of other rank-and-file assemblers, and that he was credited by management with a capacity for favorably motivating the productivity of his fellow employees. Thus, there was scant reason for Wade to have harbored a reasonable belief that *any* summon to the office of Boenker, or to the desk of first-line supervision, was for the *per se* purpose of enforcing disciplinary measures against him personally. On the other hand, Nestle's view of his own security in his recently acquired assignment to Line 4 under the supervision of

Ary, was not accompanied by similar undercurrents of stability and assurance. He had been under pressure from Ary to improve his productivity, but nothing in Nestle's experience, so far as the record evidence reveals, imbued him with knowledge or expectation that disciplinary action inexorably accompanied or followed a summons to Ary's desk or Boenker's office. It is against this background, and on the basis of these considerations, that a determination of the merits of the instant complaint must be made.

Initially, I find no violation of Section 8(a)(1) following from the refusal to Ary to acquiesce in Wade's request that he be accorded representation as a prelude to proceeding to Boenker's office, in accordance with Ary's directive. It is noteworthy that Ary merely indicated to Wade the desire of Boenker to meet with Wade in his office. Nothing in Ary's message carried the connotation of a potential disciplinary interview, and, as noted above, nothing in Wade's personal experience on the job could reasonably be viewed as inferring that imminent discipline would evolve from a meeting with Boenker in his office. Indeed, the record suggests that Wade had become somewhat jaded and bemused by past efforts of supervision to marshal his goods offices in motivating the productivity of his fellow workers. I shall recommend dismissal of the complaint to the extent that it encompasses a denial of union representation on this specific occasion occurring on the morning of February 15.

The next sequence of events involving Wade and Boenker must, however, be viewed in a different light. When, as the record reveals, Wade did, in fact, proceed to Boenker's office accompanied by Vice President Apple of the Union, Boenker was noncommittal as to the purpose of his desired meeting with Wade. In following this tact, and in failing to define the reason for wishing to meet with Wade, Boenker

left open the actual reason and purpose for desiring Wade's presence. While I find Boenker legitimately invoked his option of adjourning the meeting rather than proceeding in the presence of Apple, the incident forged an integral link in the chain of events involving Wade which transpired later in the day.[13] It was in the subsequent denial of Wade's request made in connection with an afternoon meeting in Boenker's office that Respondent, through interrelated conduct of Smith and Boenker, perpetrated violations of Section 8(a)(1) of the Act.

The record establishes that when Wade was again summoned to appear in Boenker's office on the afternoon of February 15, he and Apple first spoke with Smith. The record establishes that Smith admonished Wade to report to Boenker's office for the schedule interview without union representation. Smith's admonition was accompanied by the clear suggestion that to do otherwise would result in adverse consequences for Wade. A statement of this type emanating from an official in the capacity of industrial relations manager must be viewed as something more than benign advice; rather, it assumes the character of a specific denial of a defined request on Wade's behalf for union representation in the upcoming meeting.[14] In my view of the record, considering the close relationship between Smith's instruction to Wade and the scheduled meeting with Boenker, Smith's statement became an effective denial of

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[13] Boenker credibly testified he summoned Wade with no intention of invoking discipline, but, as found, he did not convey this to Wade or Apple. The General Counsel does not challenge the legality of Boenker's decision to adjourn the meeting rather than permit Apple to participate in this asserted counseling session.

[14] Apple had told Smith of Wade's wish for union representation and Wade's presence in Smith's office with Apple served as clear notice to Smith of his request in this regard and served to ratify Apple's action in notifying Smith of Wade's request.

representation, just as efficacious and attributable to Respondent as if expressed by Boenker himself at the convened meeting which followed immediately.

The events which thereafter followed when Wade complied with Smith's directive and reported to Boenker's office and spoke with him, are, for decisional purposes, tainted by Smith's conduct, and it is of no moment that Wade did not renew his request for union representation before Boenker while the two met and spoke together. Nor is it decisionally significant that, in actuality, during the course of the meeting, Boenker neither inferred nor imposed disciplinary action against Wade. As found, the test to be applied is the reasonable belief test measured by objective standards. Thus, it is essential to conclude from the context of events converging from, (1) the summons of Boenker's office during the morning hours, (2) the willingness of Boenker during the course of that earlier meeting to disavow any intention of discipline, (3) the renewed summons of Nestle to appear again in Boenker's office, and (4) Smith's directive to appear, that Wade had basis for reasonably believing that the meeting would be investigatory in nature and would lead to disciplinary action relating to production difficulties which had been an element of current and expressed supervisory concern.

On the other hand, in earlier directing Wade to appear at the afternoon meeting, Ary did not intrude on Wade's Section 7 rights. As on the occasion in the morning, Ary was serving as a mere conduit of Boenker's instructions, and in the afternoon, in responding to Wade's request for union representation in the upcoming meeting with Boenker, Ary merely expressed the opinion that Boenker would not accede to Wade's wishes once the meeting commenced.

However, violative of Section 8(a)(1) of the Act was Ary's refusal to grant Wade's request for representation when he directed Wade to report with him to Boenker's office following the interlude on February 16 in which tempers had flared and Wade had intemporately and profanely addressed Ary. The eruption had followed in close time sequence to Ary's censuring of Wade for apparent idleness at his work station. The credited evidence establishes Wade's request for representation and Ary's denial. The circumstances of Ary's directive to Wade to proceed to Boenker's office were such as to form a full and adequate basis for a reasonable belief on Wade's part that this meeting would be invetigatory in nature and would result in the imposition of discipline.[15]

In close analogy to the event involving Wade and Ary is the incident of the flareup between Ary and Nestle, which caused Ary to direct nestle to accompany him to Boenker's office. The record evidence suggests, and I find, that Nestle's attitude and comments to Ary, as they proceeded through the plant toward Ary's desk pursuant to Ary's request to nestle that he accompany him to his desk for a conference, had been sufficient to motivate Ary to forego the intended conference at his desk and to proceed directly to Boenker's office. This abrupt change of events was significant in and of itself, and was sufficient to raise reasonable apprehension in Nestle's mind that the resultant meeting harbored the realistic potential for disciplinary action. In this context, after the discussion with Boenker in his

[15] Neither the allegations of the complaint nor the brief filed by the Counsel for the General Counsel contain a facial indication that the General Counsel is alleging the events which immediately followed in Boenker's office to have constituted violations of the Act under the principals enunciated in *Wiengarten*. In any event, I specifically find no violation of the Act resulting from Boenker's effort to mediate the dispute which had arisen between Ary and Wade.

office began to focus on employee productivity, Nestle lodged a request for union representation. I find this request to have been timely with respect to the evolution of the substantive discussion with Boenker. The circumstances were such as to have made Nestle's request for union representation a justified one for, upon an application of the objective standard test, he must be found to have reasonably feared that when Boenker directed the flow of conversation to the question of employee productivity, the meeting had taken a turn which would result in disciplinary action involving him.[16]

Similarly, I find Ary interfered with Nestle's Section 7 rights and violated Section 7 of the Act in denying Nestle's request for union representation before proceeding with an interview at Ary's desk. Past events, including supervisory scrutiny of Nestle's job performance and Ary's own verbal warnings concerning the consequences of Nestle's failure to improve his productivity, were such as to have raised in Nestle's mind the specter of unfavorable job action flowing from the meeting with Ary, who possessed authority to initiate and dispense discipline.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in Section III, above, occurring in connection with the operations of Respondent described in Section I, above, have a close, inti-

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[16] In any event, the meeting with Boenker and Ary cannot be separated for cause and effect purposes, and was, in fact, a single, interrelated episode tied to the events which had transpired between Nestle and Ary on the work floor. Thus viewed, Nestle's initial request is rendered efficacious and operative with respect to all elements of the continuing incident.

mate, and substantial relation to trade, traffic, and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the foregoing findings of fact, and the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By denying requests of employees Wade and Nestle for union representation during the course of interviews ordered and thereafter conducted by Respondent, under circumstances in which, at the time of the employees' request, Wade and Nestle each had reasonable grounds for fearing the interviews might result in their discipline, Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(1)(1) of the Act.

4. The aforesaid unfair labor practiices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[17]

ORDER

Lennox Industries, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Requiring any employee to take part in an interview, meeting or conference without union representation, if such representation has been requested by the employee and the employee has reasonable grounds to fear or believe that the interview, meeting, or conference will result in disciplinary action.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its Ft. Worth, Texas, place of business copies of the attached notice marked, "Appendix."[18] Copies

[17] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[18] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading, "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read, "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

of said notice, on forms provided by the Regional Directior for Region 16, after being duly signed by its authorized representatives, shall be posted by Respondent immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 16, in writing, within 20 days of the date of this Order, what steps its has taken to comply herewith.

Dated: January 31, 1979

/s/ JAMES T. BARKER

Administrative Law Judge

3. Judgments of the Court of Appeals for the Fifth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LENNOX INDUSTRIES, INC.,
Petitioner, Cross-Respondet,

versus **No. 79-3890**

NATIONAL LABOR RELATIONS BOARD,

Respondent, Cross-Petitioner.

JUDGMENT

Before GOLDBERG, POLITZ and SAM D. JOHNSON, Circuit Judges.

On February 17, 1981, being fully advised in the premises, the Court handeddown its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF it is hereby ordered and adjudged that the said order of the National Labor Relations Board be enforced and that Lennox Industries, Inc., its officers, agents, successors, and assigns, abide by and perform the directions in said order contained.

Costs are to be taxed against petitioner-cross respondent.

FILED: February 17, 1981

ISSUED AS MANDATE:

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus **No. 79-3894**

LENNOX INDUSTRIES, INC.,

Respondent.

JUDGMENT

Before GOLDBERG, POLITZ and SAM D. JOHNSON, Circuit Judges.

On February 17, 1981, being fully advised in the premises, the Court handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF it is hereby ordered and adjudged that the said order of the National Labor Relations Board be enforced and that Lennox Industries, Inc., its officers, agents, successors, and assigns, abide by and perform the directions in said order contained.

Costs are to be taxed against respondent.

FILED: February 17, 1981

ISSUED AS MANDATE:

4. Order on Petitions for Rehearing and for Rehearing En Banc

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

Filed:
March 19, 1981

Nos. 79-3890 & 79-3894

LENNOX INDUSTRIES, INC.,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent,

Petition for Review of Order of National Labor Relations Board

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion _____, 5 Cir., 198__, _____F.2d____).
(March 19, 1981)

Before GOLDBERG, POLITZ and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ HENRY A. POLITZ
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

Form 704-2

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of _____, 1981, three true and correct copies of this Petition for Writ of Certiorari were served on the NLRB by mailing same, first class postage prepaid, addressed to its counsel of record, Elliott Moore, Deputy General Counsel, National Labor Relations Board, Washington, D. C. 20570. All parties required to be served have been served.

BENNETT W. CERVIN

No. 80-1845

JUN 2 1981

ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

LENNOX INDUSTRIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(1) of the National Labor Relations Act by denying an employee's requests for union representation and proceeding to conduct an interview which the employee had reasonable grounds to believe might lead to disciplinary action against him.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Statement	2
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

AAA Equipment Service Co. v. *NLRB*, 598 F.2d 1142	7, 8
Alfred M. Lewis, Inc. v. *NLRB*, 587 F.2d 403	7, 8
Amoco Chemicals Corp., 237 N.L.R.B. 394	7
General Electric Co., 240 N.L.R.B. 479	7
NLRB v. *Gissel Packing Co.*, 395 U.S. 575	7
NLRB v. *Weingarten, Inc.*, 420 U.S. 251	4, 5, 6, 7, 9, 10
Roadway Express, Inc., 246 N.L.R.B. No. 180	9
Universal Camera Corp. v. *NLRB*, 340 U.S. 474	8-9

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:	
Section 7, 29 U.S.C. 157	2, 4
Section 8(a)(1), 29 U.S.C. 158(a)(1)	2, 4

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-10) is reported at 637 F.2d 340. The decision and order of the National Labor Relations Board (Pet. App. A-11 to A-23) are reported at 244 N.L.R.B. No. 88.

JURISDICTION

The judgments of the court of appeals (Pet. App. A-51 to A-52) were entered on February 17, 1981. A timely petition for rehearing was denied on March 19, 1981 (Pet. App. A-53 to A-54). The petition for a writ of certiorari was filed on May 4, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), provides:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, is set forth at page 2 of the petition.

STATEMENT

1. In January 1978, petitioner transferred Paul Nestle, an assembly line employee, to a line producing a different product from that on which he had previously worked. This line's workers, particularly Nestle, had difficulty maintaining the desired production speed and Nestle was transferred four times to different tasks. During the first two weeks in February, Nestle's work was closely watched by his immediate supervisor, Leo Ary, and by other supervisors. During this period, Ary told Nestle that his work "just wasn't 'going to get it' " and that if he did not increase his speed, Ary would have to take action against him (Pet. App. A-29).[1]

On February 16, 1978, Ary approached Nestle at his work station and said he wanted to speak to him

---

[1] Disciplinary action in the Company's plant was initiated by first-line supervisors in consultation with their superiors, including Fred Boenker, manager of final assembly, to whom Ary and eight other first-line supervisors reported. When a decision to take disciplinary action was made, the first-line supervisor transmitted a written notice of discipline to the affected employee (Pet. App. A-27 to A-28).

at his (Ary's) desk. Nestle asked to have a committeeman present.[2] Ary replied that Nestle did not need a committeeman. Nestle said he continued to want one, and asked another employee, who was standing nearby, to witness his request. Ary and Nestle then proceeded toward Ary's desk. Before they arrived, Ary interpreted a remark by Nestle as a threat and consequently asked him to proceed to Assembly Manager Boenker's office (Pet. App. A-14 to A-15, A-35).

There, Ary told Boenker that Nestle had threatened him. Nestle denied the charge. Boenker asked whether there were any witnesses and was informed that there were none. Boenker then handled a telephone call, and, while his attention was thus diverted, Ary and Nestle expressed their animosity toward each other. After finishing the call, Boenker told Ary and Nestle that he was aware of their feelings but wanted to see them get along (Pet. App. A-15, A-36).

Boenker also said that he had been watching Nestle and another employee and believed they were instigating a production slowdown. Nestle responded that he was unused to working on small units, and asked to be transferred back to his former job. Nestle then asked for a committeeman to represent him. Boenker replied that, if he thought Nestle needed a committeeman, he would get one. Although

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[2] The collective bargaining agreement between petitioner and the United Steelworkers of America, AFL-CIO, Local 4629, provided in pertinent part (Pet. App. A-27):

> Any supervisor meeting with an employee for the purpose of issuing written disciplinary action will so advise the employees [*sic*] so that the employee, at his discretion, may invite either his committeeman or the union President or a pre-designated alternate officer to attend. The committeeman or union officer must work the same shift as the employee.

Nestle indicated that he continued to want a committeeman present, none was called and the discussion continued. Boenker said that he could not change Nestle's job assignment and reminded Nestle that his production would have to improve (Pet. App. A-15, A-36 to A-37).

2. The Board, relying on *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975), found that Nestle reasonably feared that discipline would result from the interview with Ary and Boenker, and concluded that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by nevertheless denying Nestle's request for representation and proceeding with the interview. The Board explained (Pet. App. A-16; footnotes omitted):

> In view of the prior remarks made to Nestle by Ary that he needed to acquire greater speed and the job he was doing was not "going to make it," it is apparent that Nestle entertained a reasonable fear of discipline when Ary requested that he go with him to Ary's desk. At no time did Ary dispel the apprehension expressed by Nestle in requesting union assistance by advising him that no disciplinary action was being considered. On the contrary, Ary's response was limited to denying this request by telling him that he did not "need" such assistance. Such an equivocal response is not sufficient to allay Nestle's fear of disciplinary action, as Ary did not give any reason why the employee did not "need" assistance. In this circumstance, the comment that an employee does not need assistance is not sufficient basis to disregard an employee's request.

The Board also concluded that petitioner violated Section 8(a)(1) of the Act when it denied Nestle's second request for union assistance which was

prompted by Boenker's accusation that Nestle was engaging in a slowdown of production (Pet. App. A-17). The Board rejected petitioner's contention that Nestle waived his right, if any, to union assistance by failing to repeat the request (made on the shop floor) at the inception of the discussion in Boenker's office, observing (Pet. App. A-17): "Once Ary actually initiated the interview in Boenker's office, the *Weingarten* violation had been established, as the employee who has made a request for union representation on the plant floor need not repeat the request at the interview."

3. The court of appeals upheld the Board's decision and enforced its order. In so doing, the court rejected petitioner's contention (Pet. App. A-4) that the interview was not investigatory and that Nestle could not have reasonably feared that it would result in discipline, distinguishing a "meeting * * * designed simply to show an employee how to improve his work performance [as to which] no right to union representation inheres" from the instant case where the employee "was asked questions concerning both his poor work performance and his less than friendly altercation with his supervisor" (Pet. App. A-6). The questioning of Nestle was "investigatory in that it [was] designed to elicit responses which might well result in discipline against the employee" (*ibid.*). The court further concluded that the Board's finding that Nestle reasonably feared discipline as a result of the meeting was supported by substantial evidence (Pet. App. A-8 n.8).

The court also rejected petitioner's contention that Nestle should have requested the presence of a union representative at the outset of the meeting in Boenker's office because Boenker was unaware of the request made to Ary and because the meeting con-

cerned not only Nestle's work performance but his confrontation with Ary as well (Pet. App. A-8). The court agreed with the Board that the two meetings were a " 'single, interrelated episode' " and that "supervisor Ary was present at the second meeting as well as the first, and * * * was well aware of Nestle's request" (Pet. App. A-9). The court concluded (*ibid.*):

> The rationale of *Weingarten* does not require an employee to repeat his request for union representation each time the subject changes during a meeting with company officials. Such a rule would be both burdensome for the employee and tedious for the company officials. As long as one or more company officials are aware of the employee's desire and request for the presence of a union representative, a single request will suffice for the multiple subjects of a single meeting, or for multiple meetings which are part of a "single, interrelated episode," as here.

ARGUMENT

The decision of the court of appeals correctly applies the principles enunciated by this Court in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975), and there is no conflict among the circuits. Further review therefore is unwarranted.

In *Weingarten*, the Court held that an employee has the right to union representation at an investigatory interview that he reasonably fears will result in disciplinary action. 420 U.S. at 257. In the instant case, the Board found, and the court of appeals agreed, that Nestle reasonably feared that discipline would result from his meetings with Ary and Boenker.

Petitioner urges, however (Pet. 6), that an employee should not be entitled to union representation

unless the employer actually intends to discipline him or in fact does so. This suggested rule is contrary to *Weingarten*, which requires only that an employee's belief that he will be disciplined be reasonable. There, as here, the employee was not in fact disciplined. 420 U.S. at 255-256. Moreover, under *Weingarten*, the reasonableness of an employee's fear of discipline is to be measured by objective standards since consideration of an employee's subjective state of mind would " 'involv[e] an endless and unreliable inquiry.' " 420 U.S. at 257 n.5, quoting *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 608 (1969). To condition the right to union representation on the employer's undisclosed subjective intent would involve an equally endless and unreliable inquiry.[3]

Contrary to petitioner's contention (Pet. 4-8), the decision below does not conflict with *Alfred M. Lewis, Inc.* v. *NLRB*, 587 F.2d 403, 410 (9th Cir. 1978), or *AAA Equipment Service Co.* v. *NLRB*, 598 F.2d 1142, 1146 (8th Cir. 1979). Neither case holds that union representation can be denied on the basis of an employer's undisclosed intent not to impose discipline. In *Lewis*, the court held that certain employees were not entitled to representation at interviews where discipline was imposed on the basis of a *prior* investigation because "it is the presence of an investigatory element which gives rise to the right." 587 F.2d at 411. At the same time, the *Lewis* court

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[3] Where an employer discloses its subjective intent—*i.e.*, where it expressly assures an employee that he or she will not be disciplined—a request for representation need not be honored since, as the Board has held, the employee cannot in such circumstances reasonably believe that discipline will be imposed. *General Electric Co.*, 240 N.L.R.B. 479, 480 (1979); *Amoco Chemicals Corp.*, 237 N.L.R.B. 394, 397 (1978). Thus, petitioner's assertion (Pet. 7, 11) that the court of appeals' decision will prevent employers from conducting any " 'work-related' employer-employee discussions" is groundless.

upheld the Board's conclusion that the employees had a right to representation at "counseling sessions" where they were questioned about their failure to meet production quotas, because such questioning justified the employees' fear that the interview would lead to disciplinary action. *Id.* at 410. *AAA Equipment Service* involved a parking lot encounter between an employee and two supervisors during which the employee refused even to allow the supervisors to say why they wanted to talk to him. The court found that the employee had resolved not to talk to the supervisors on any subject without a shop steward present, that the supervisors had intended to have only "a run-of-the-mill conversation * * * that involved 'the giving of instructions or training or needed corrections of work techniques,' " and that "there was no reasonable basis for [the employee] 'to fear that any adverse impact [would] result from the interview' even if the chance encounter on the parking lot can be termed an investigative interview." 598 F.2d at 1144. In the case at bar, there was, as we have demonstrated above, ample reason for Nestle—who was accused of threatening his supervisor and of deliberately slowing down production—"to fear that [an] adverse impact [would] result from" the meetings with Ary and Boenker.

Petitioner further contends (Pet. 8-11) that Nestle waived his right to representation in the meeting with Boenker because he did not repeat the request made to Ary on the shop floor. This assertion merely takes issue with the Board's finding, upheld by the court of appeals, that the transactions here at issue constituted "a single, interrelated episode" in which petitioner was on notice that Nestle desired union representation. That essentially factual question raises no issue warranting resolution by this Court. *Universal*

Camera Corp. v. *NLRB*, 340 U.S. 474, 480-81 (1951). In any event, the Board's finding is plainly correct. As shown in the Statement, only a brief period elapsed between the two meetings (*i.e.*, the time required to go from the work floor to Boenker's office); Ary was aware of Nestle's request for union representation and was an active participant in the second meeting;[4] the new topic introduced at the second meeting—Nestle's alleged threat to Ary—increased, rather than diminished, the risk of discipline and hence the likelihood that Nestle would desire representation. Finally, petitioner's submission (Pet. 10-11) that repeated requests for representation should be required whenever a new subject is introduced or a new supervisor joins an interview is contrary to this Court's teachings in *Weingarten*. Where an employer does not respond to a request for representation but instead raises new and more serious allegations of misconduct, a "fearful or inarticulate" em-

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[4] Petitioner concedes (Pet. 9 n.2) that the Board has properly held that "an employee may make a request for union representation while on the plant floor, and need not repeat the request at the office if the official there is aware of the request." *Roadway Express, Inc.*, 246 N.L.R.B. No. 180 (1979). However, it contends (Pet 9) that this rationale is inapplicable here because Ary, in the second meeting, "was acting as the complaining witness rather than as the presiding official." This argument overlooks the uncontested finding (Pet. App. A-28) that Ary could initiate disciplinary action and that he normally consulted with his superiors when he believed such action was warranted. Thus, at the meeting in Boenker's office Ary was not merely relating the facts so that Boenker could decide what, if any, disciplinary action was appropriate; Ary was seeking assistance in a decision he ultimately would make. Accordingly, there is no basis for suggesting that a representation request made to him was directed to the wrong person.

ployee can hardly be expected to repeat the previously-ignored request. As the court of appeals correctly recognized (Pet. App. A-5), placing the burden on the employee to make multiple requests for representation in this situation would "perpetuate[] the inequality [of bargaining power] the Act was designed to eliminate, and bar[] recourse to the safeguards the Act provided 'to redress the perceived imbalance of economic power between labor and management.'" *NLRB* v. *J. Weingarten, Inc.*, *supra*, 420 U.S. at 262 (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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JUNE 1981

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